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No. 86-1935

In the Supreme Court of the United States

OCTOBER TERM, 1987

KATHY M. MASON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(2), violates the Constitution by permitting a defendant to be convicted by the two-thirds vote of a six-member court-martial panel.

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 127. The opinion of the Army Court of Military Review (Pet. App. 3a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987. The petition for a writ of certiorari was filed on June 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial in January 1986. She was convicted of assaulting a child under the age of 16 and of false swearing, in violation of Articles 128 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 928 and 934. Petitioner was sentenced to five years' confinement, to forfeiture of all pay, and to a bad conduct discharge. The convening authority reviewed the case and approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 3a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. Petitioner was convicted of deliberately causing second degree burns to the feet and perineum of her 20-month old daughter by holding the child in a tub of hot water. She was also convicted of making false statements under oath to an agent of the Army Criminal Investigation Command by telling the agent that her daughter's burns resulted when petitioner accidentally dropped a pan of boiling water after tripping over her daughter.

2. Pursuant to its authority under Art. I, § 8, Cl. 14, of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," Congress has enacted the Uniform Code of Military Justice, which governs the size, selection process, composition, and voting procedures of courts-martial. Article 16(1)(A) of the UCMJ, 10 U.S.C. (Supp. IV) 816(1)(A), provides that general courts-martial shall consist of at least five members, although any greater number is permissible. Article 25(d)(2) of the Code, 10 U.S.C. 825(d)(2), directs the court-

martial convening authority[1] to select as court-martial panel members "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament."[2] Article 25(c)(1) of the Code, 10 U.S.C. (Supp. IV) 825(c)(1), allows an enlisted defendant to insist that at least one-third of the court-martial panel be made up of enlisted personnel equal to or senior in rank to the defendant and from a different military unit, unless physical conditions or military exigencies prevent such persons from being assigned to a court-martial. Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), provides for a two-thirds majority vote of the panel members for conviction of all crimes not carrying a mandatory death sentence. On sentencing, a two-thirds majority vote is necessary for a sentence of imprisonment less than ten years, a three-fourths majority is required for sentences of

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[1] A "convening authority" is a commander who is authorized to convene a court-martial pursuant to Articles 22-24 of the UCMJ, 10 U.S.C. (& Supp. IV) 822-824, and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States—1984 (Manual)*. The duties of the convening authority include the selection and appointment of court-martial panel members (a practice commonly known as "detailing" members of a court-martial), directing that the accused be tried by the court-martial for the charged offenses (a practice commonly known as the "referral" of charges to a court-martial), and a post-trial review of the proceedings. See Arts. 25, 34, 60, UMCJ, 10 U.S.C. (& Supp. IV) 825, 834, 860; see also Rules 503, 601, 1107, *Manual*.

[2] Before the court-martial panel is assembled, the convening authority is free to add, delete, or substitute panel members. Arts. 25, 29, UCMJ, 10 U.S.C. (& Supp. IV) 825, 829.

ten years' incarceration or more, and a unanimous vote is necessary to impose the death penalty.[3] The military justice system also does not provide for a retrial in the event that the panel is unable to agree by the necessary majority. When that occurs, the defendant is automatically acquitted. Rule 921(c)(3), *Manual for Courts-Martial, United States—1984*.

3. Petitioner's court-martial was convened at Frankfurt, Germany, by the Commander of the Third Armored Division. When the court-martial convened on January 16, 1986, nine soldiers were detailed to serve as panel members (Tr. 67). Following voir dire, the trial judge granted two defense challenges for cause, and the defense peremptorily challenged a third member, which left the number of members at six (Tr. 91, 117-120). The defense sought to have the trial judge instruct the panel that it must be unanimous to convict petitioner of any charged offense (Tr. 12; AX 2). The trial judge denied the motion (Tr. 13).

ARGUMENT

Relying on *Burch* v. *Louisiana*, 441 U.S. 130 (1979), which held that the Sixth and Fourteenth Amendments require verdicts by six-person juries in serious state criminal cases to be unanimous, petitioner contends that her conviction by a potentially nonunanimous court-martial panel violates the Due Process Clause of the Fifth Amendment.[4] That con-

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[3] See *Mendrano* v. *Smith*, 797 F.2d 1538, 1540-1541 (10th Cir. 1986); *United States* v. *Morphis*, 7 C.M.A. 748, 752-754, 23 C.M.R. 212, 216-218 (1957); *United States* v. *Walker*, 7 C.M.A. 669, 673-675, 23 C.M.R. 133, 137-139 (1957).

[4] The Uniform Code of Military Justice does not provide any method of discovering the actual vote of the panel

tention does not warrant review by this Court, for several reasons.[5]

1. There is no conflict among the circuits on the question presented by petitioner. The military courts have consistently rejected the claim that the court-martial system established by Congress is invalid under *Burch* v. *Louisiana*, *supra*, because a service-member may be convicted by a two-thirds vote of the court-martial panel. *United States* v. *Neeley*, 21 M.J. 606, 609 (A.F.C.M.R. 1985); *United States* v. *Seivers*, 9 M.J. 612, 615 (A.C.M.R.), petition granted on other grounds, 9 M.J. 253 (C.M.A.), aff'd, 9 M.J. 397 (C.M.A. 1980); *United States* v. *Guilford*, 8 M.J. 598, 601-602 (A.C.M.R. 1979), petition denied, 8 M.J. 242 (C.M.A. 1980). These rulings are consistent with the decision of the only federal court of appeals to consider the issue in light of this Court's decision in *Burch* v. *Louisiana*, *supra*. See *Mendrano* v. *Smith*, 797 F.2d 1538, 1544-1547 (10th Cir. 1986).

2. In addition, the decision below is correct regardless of whether petitioner's claim is examined in light of the historical guarantee of a right to a jury trial or the right to due process.

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members. Thus, it is not known whether petitioner was convicted by a unanimous vote of the panel.

[5] This Court has previously denied certiorari in several other cases presenting substantially the same question. *Delacruz* v. *United States*, cert. denied, No. 86-1675 (May 18, 1987); *Dodson* v. *United States*, cert. denied, No. 86-407 (Dec. 8, 1986); *Garwood* v. *United States*, cert. denied, No. 85-175 (Dec. 2, 1985); *Hutchinson* v. *United States*, cert. denied, 469 U.S. 981 (1984).

a. Petitioner seeks to impose on courts-martial the same requirements that the Sixth Amendment demands of trials by jury. It is firmly settled, however, that the right to a jury trial does not apply to court-martial proceedings.[6] The Framers specifically exempted "cases arising in and land or naval forces" from the Fifth Amendment requirement that the defendant be indicted by a grand jury. By so doing, the Framers also "meant to limit the right to trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866). As this Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring

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[6] *E.g.*, *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States*, No. 85-1581 (June 25, 1987); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); see *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (power to provide for trial and punishment of military offenses is independent of the judicial power); see also *Mendrano* v. *Smith*, 797 F.2d at 1544; *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961) (both holding that a service-member is not entitled to a jury trial); see generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Since petitioner had no Article III or Sixth Amendment right to a trial by petit jury, she also had no right under those provisions to a unanimous jury verdict.

b. Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8, Cl. 14), and "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military" (*Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 12). See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the voting procedures for courts-martial is entitled to particular deference, since the practices at issue predate the Constitution and have been carried forward throughout our history. *Solorio* v. *United States*, slip op. 7-11; see also *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950) (citations omitted) ("The constitution of courts-martial, like other matters relating to their organization and administration * * * , is a matter appropriate for congressional action."); accord *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319-320 (1985).

Unanimity has never been a feature of court-martial proceedings.[7] The nation's first military law,

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[7] The origins and development of the court-martial system are distinct from the birth of the jury trial. The British courts-martial are believed to have developed from the courts of chivalry, which were separate from the common law

the Articles of War of 1776, like their predecessor, the British Articles of War,[8] required only a simple

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courts. *Ex parte Reed*, 100 U.S. 13, 20-21 (1879); 1 W. Winthrop, *Military Law* 47-49 (1886). Modern British military law stems from the Mutiny Act of 1689, 1 W. & M., ch. 5, *reprinted in* 2 W. Winthrop, *Military Law, supra*, App. 38-60, which, as modified, was in effect at the time of the American Revolution. 1 & 2 W. Winthrop, *Military Law and Precedents* 18-20 (rev. 2d ed. 1920). The first American military code, the Articles of War of 1776, was adopted by the Second Continental Congress when it went about raising an army. That code was adapted from the British Mutiny Act and the Massachusetts Articles of War. 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, at 21-22, App. 947-960.

During the 19th and the early part of the 20th centuries, courts-martial were composed of no less than five and no more than 13 members. 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, at 159; American Articles of War of 1806, Art. 64, 2 Stat. 367, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, App. 981; American Articles of War of 1874, Art. 75, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, App. 986; American Articles of War of 1916, ch. 418, Art. 43, 39 Stat. 657. The number of members was to be 13 "where the number can be convened without manifest injury to the service." This Court, however, found that that language was merely directory to the officer appointing the Court and that the officer's decision was conclusive. *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 34-35 (1827); accord *Bishop* v. *United States*, 197 U.S. 334, 339-340 (1904); *Mullan* v. *United States*, 140 U.S. 240, 245 (1891) (convening officer's determination that trial by members junior in rank to the accused could not be avoided).

[8] The British Mutiny Act and the British Articles of War required the vote of nine of 13 court-martial members to impose the death penalty. 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, App. 921, Art. X; *id.* App. 493, § 15, Art. VII. Neither the Mutiny Act nor the Articles of War specified the number of votes necessary to convict a defendant at a general court-martial or to impose any sentence other than death. The Articles of War, however, provided

majority vote to convict a defendant and a two-thirds majority to sentence him to death. Articles of War of 1776, Art. 5, § 15, *reprinted in* 5. J. Continental Cong. 800-801 (W. Ford ed. 1906);[9] see Act of Mar. 2, 1799, ch. 24, 1 Stat. 709 (An Act for the Government of the Navy); Act of Apr. 23, 1800, ch. 33, 2 Stat. 45 (An Act for Better Government of the Navy)[10]; A. Macomb, *A Treatise on Martial Law, and Courts-Martial* 144 (1809); 1 & 2 W. Winthrop, *Military Law and Precedents* 534 (rev. 2d ed. 1920); *id.* App. 972; see also American Articles of War of 1806, ch. 20, 2 Stat. 359. Throughout the 19th century, a majority vote was sufficient to convict a defendant of a non-capital crime and a two-thirds majority was sufficient for a capital offense. 1 & 2 W. Winthrop, *Military Law*

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that inferior courts-martial "shall give Judgment by the Majority of Voices." 1 & 2 W. Winthrop, *Military Law and Precedents, supra,* App. 943, § 15, Art. 12; see R. Scott, *The Military Law of England* 131 (1810).

[9] The Article provided: "All persons who give evidence before a general court-martial, are to be examined upon oath; and no sentence of death shall be given against any offender by any general court-marital, unless two-thirds of the [members] shall concur therein." Similar numerical requirements were reflected in the American Articles of War of 1806, ch. 20, Art. 87, 2 Stat. 369, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra,* App. 984, and in the American Articles of War of 1874, Art. 96, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra,* App. 994.

[10] During the Revolution, the Continental Congress adapted the British naval regulations for use by the Continental Navy. Those regulations provided for courts-martial similar to the general courts-martial under the Articles of War, and they required only a simple majority to convict and sentence a defendant. Van Loan, *supra,* 57 Cornell L. Rev. at 382 n.102.

and Precedents, supra, at 377; compare American Articles of War of 1806, ch. 20, Art. 87, 2 Stat. 369, with American Articles of War of 1874, Art. 96, *reprinted in* 1 & 2 W. Winthrop, *Military Law and Precedents, supra*, App. 994.

In the early 20th century, Congress modified the voting requirements for Army courts-martial. The Articles of War were amended in 1916 to require a two-thirds vote of the panel members to convict a defendant of an offense with a mandatory death penalty. American Articles of War of 1916, ch. 418, Art. 43, 39 Stat. 657. In 1920, Congress again revised the voting requirements. Act of June 4, 1920, ch. 227, Art. 43, 41 Stat. 795. The 1920 amendment required a unanimous verdict to convict a defendant in the Army when the death penalty was mandatory. For all other crimes, conviction required a two-thirds majority. By contrast, the voting requirements in Navy courts-martial were left untouched by the 1920 amendments. As a result, only a simple majority was necessary to convict a sailor and a two-thirds majority to impose the death penalty. See H.R. Rep. 491, 81st Cong., 1st Sess. 26, 49, 74 (1949).

Following World War II, Congress reconsidered the Articles of War and replaced them with the Uniform Code of Military Justice. During hearings on the UCMJ, Congress heard testimony in favor of extending the unanimity requirement to sentences of life imprisonment as well as capital crimes.[11] Article 52 of the UCMJ, 10 U.S.C. 852, was nevertheless adopted in substantially its present form. Congress has modified the UCMJ on 24 occa-

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[11] *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 565, 1081-1082 (1949).

sions since Article 52 was enacted, but Congress has never seen fit to change Article 52. History therefore leads inexorably to the conclusion that the two-thirds majority vote requirement in Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), represents Congress's settled and considered judgment on the balance to be struck between the rights of the individual and the special requirements of the armed forces.

That judgment is reasonable. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to try cases, "the basic fighting purpose of armies is not served" (*ibid.*). Congress determined that the diversion of resources necessary to conduct the retrials that would result from a unanimous verdict requirement was too high a price to pay in terms of lost military preparedness. Congress therefore provided for only one trial of a defendant, at which a two-thirds majority vote would decide the outcome. The rule that no retrials are permitted in the military if there is a "hung jury" provides a defendant with "a significant recompense" for the majority vote requirement. *Mendrano* v. *Smith*, 797 F.2d at 1546. Petitioner has not made the "extraordinarily weighty" showing necessary to overcome this long-standing congressional judgment. *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).[12]

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[12] This Court has consistently noted that servicemembers do not enjoy some of the rights that the Constitution guarantees in civilian criminal proceedings. See *Middendorf* v. *Henry*, *supra*; *Schlesinger* v. *Councilman*, 420 U.S. 738, 746, 757-760 (1975); *Parker* v. *Levy*, 417 U.S. 733, 743-752 (1974); *Gosa* v. *Mayden*, 413 U.S. 665, 672-678 (1973) (plurality opinion). At the same time, it is important to note that, although Congress has not granted the military defendant a

c. The lead opinion in *Ballew* v. *Georgia*, 435 U.S. 223, 231-243 (1978) (opinion of Blackmun, J.), relied heavily on empirical studies of the group dynamics of civilian juries. Much the same reasoning formed the basis for the decision in *Burch* v. *Louisiana*, 441 U.S. at 138. No comparable studies, however, address the dynamics of courts-martial panels.[13] In light of the functional and compositional differ-

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right to trial by jury, Congress has established independent safeguards against unjustified convictions. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. This procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. (Supp. IV) 834(a). The court of military review may not affirm findings of guilt unless it is independently convinced of the defendant's guilt beyond a reasonable doubt, Art. 66(c), UCMJ, 10 U.S.C. 866(c), and the accused may seek review of that decision by the Court of Military Appeals, a panel of three civilian judges, Art. 67, UCMJ, 10 U.S.C. (& Supp. IV) 867. See generally *United States* v. *Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970).

[13] Petitioner relies (Pet. 9-10) on the opinion of Professor Saks (Pet. App. 4a-7a) that conclusions drawn from studies of civilian juries should be applicable to court-martial panels. But Professor Saks admits (*id.* at 5a, 7a) that he knows of no comparable studies involving military populations. More importantly, Professor Saks admits that he is unfamiliar with the procedures used in courts-martial (*id.* at 5a). He is therefore unable to address any effects that may result from dissimilarities between courts-martial and jury trials.

ences between civilian juries and courts-martial panels, the studies on which *Burch* and *Ballew* relied are not immediately applicable to the military setting. *United States* v. *Guilford*, 8 M.J. at 601-602.[14] Given the special deference due to Congress's judgments in this area and its superior factfinding capabilities, the question whether studies of the type relied upon in *Ballew* justify a change in the UCMJ should be left to Congress.

Finally, petitioner argues (Pet. 6-8) that Congress's recent amendments to the UCMJ demonstrate Congress's intent to conform military to civilian procedures whenever doing so would not disrupt the military's mission. That argument, however, over-

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[14] In *Burch*, the Court concluded that juries must be "a sufficient size to promote group deliberation, free from outside intimidation, and to provide a fair possibility that a cross-section of the community would be represented." 441 U.S. at 135. The latter goal, however, is inapplicable to trials by courts-martial. The members of a civilian jury are selected at random to represent a cross-section of the community. By contrast, the members of a court-martial panel are deliberately chosen on the basis of their qualifications to sit as panel-members. Art. 25, UCMJ, 10 U.S.C. (& Supp. IV) 825. The members composing a court-martial are drawn exclusively from the same profession as the defendant and they have a specialized knowledge of its working. The failure randomly to select a court-martial panel from a pool containing all servicemen, including enlisted personnel with the same rank as the defendant, is not unconstitutional. *DeWar* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986) (Sixth Amendment cross-section requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d at 1544-1547.

looks the fact that Congress has refused to adopt a unanimity requirement for courts-martial or to impose any other Sixth Amendment requirements upon the military justice system. Had Congress intended the result petitioner seeks, Congress could easily have amended Article 52, UCMJ, 10 U.S.C. 852, to achieve it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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